81-2249

Office - Supreme Court, U.S.
FILED
JUN 7 1982
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

GEORGE W. SUMNER, Warden,
San Quentin Prison,

Petitioner,

v.

ANTHONY PAUL MAXWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEORGE DEUKMEJIAN, Attorney General of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant Attorney General--Criminal Division
S. CLARK MOORE,
Assistant Attorney General
EDWARD T. FOGEL, JR.,
Deputy Attorney General
SANDY R. KRIEGLER,
Deputy Attorney General
MARK ALAN HART,
Deputy Attorney General
and Attorney of Record
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2226

Attorneys for Petitioner

QUESTIONS PRESENTED

I

Does federal habeas corpus jurisdiction lie for review of a state court's ruling where, without justification, a state prisoner fails to contest the ruling on direct appeal to the state's highest tribunal and his subsequent petition for habeas corpus relief in that court is denied based on his failure to have raised the issue on direct appeal?

II

May a federal court, consistent with principles of comity, disregard a state court's factual determinations, reweigh the evidence presented to the state court and make contrary findings, where the federal court's findings are based solely on a review of state court transcripts?

III

Should a state conviction obtained prior to the decision in Faretta v. California (1975) 422 U.S. 806, be overturned on federal habeas corpus based on retroactive application of the right of self-representation as defined in Faretta v. California?

* * * *

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	4
OPINIONS BELOW	9
JURISDICTION	9
CONSTITUTIONAL PROVISIONS INVOLVED	10
STATUTES INVOLVED	11
STATEMENT OF THE CASE	16
REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED	20
I RESPONDENT'S FAILURE TO RAISE THE QUESTION OF SELF-REPRESENTATION IN HIS PETITION FOR HEARING TO THE CALIFORNIA SUPREME COURT CONSTITUTES A WAIVER BARRING FEDERAL HABEAS CORPUS RELIEF	20
A. Respondent Failed to Perfect his Claim in Accordance With California State Procedures	21
B. Respondent's Failure to Perfect his Claim in Accordance with California Procedural Rules Bars Federal Habeas Corpus Relief	27

TABLE OF CONTENTS
Continued

		Page
II	THE FEDERAL COURTS BELOW ERRED IN MAKING FINDINGS CONTRARY TO THE STATE TRIAL COURT WHERE THE FINDINGS WERE BASED ONLY ON A REVIEW OF THE STATE TRIAL COURT TRANSCRIPTS	36
III	THE DECISION OF THE COURT OF APPEALS IMPERMISSIBLY APPLIES THE ABSOLUTE RIGHT OF SELF-REPRESENTATION RETROACTIVELY TO A TRIAL COMMENCING PRIOR TO THIS COURT'S DECISION IN FARETTA V. CALIFORNIA	42
CONCLUSION		45
APPENDICES		

TABLE OF AUTHORITIES

Cases

Federal:	Page
Bittaker v. Enomoto (9th Cir. 1978) 587 F.2d 400	33,34
Broadcast Music v. Havana Madrid Restaurant Corp. (2d Cir. 1949) 175 F.2d 77	38-39
Carothers v. Rhay (9th Cir. 1979) 594 F.2d 225	30
Chapman v. United States (5th Cir. 1977) 553 F.2d 886	43
Davis v. United States (1973) 411 U.S. 233	34
Engle v. Isaac (1982) ___ U.S. ___, 102 S.Ct. 1558	28,29,32, 33,34
Estelle v. Williams (1976) 425 U.S. 501	28
Evans v. Maggio (5th Cir. 1977) 557 F.2d 430	31
Faretta v. California (1975) 422 U.S. 806	1,32,33-34, 39,42,43
Forman v. Smith (2d Cir. 1980) 633 F.2d 634	30,34-35
Francis v. Henderson (1976) 425 U.S. 536	28,31,34
Garrison v. McCarthy (9th Cir. 1981) 653 F.2d 374	25,26

TABLE OF AUTHORITIES
Continued

Cases

Federal:	Page
Gonzales v. Stone (9th Cir. 1976) 546 F.2d 807	25
Harris v. Superior Court (9th Cir. 1974) 500 F.2d 1124	27-28
Henderson v. Kibbe (1977) 431 U.S. 145	41
Martin v. Wyrick (8th Cir. 1978) 568 F.2d 583	43
Maxwell v. Sumner (9th Cir. 1982) 673 F.2d 1031	9,19,21,22, 23,39,42
Miranda v. Arizona (1966) 384 U.S. 436	29
Myers v. Washington (1981) 646 F.2d 355	33
People v. Holcomb (Mich. 1975) 395 Mich. 326	43
Picard v. Connor (1971) 404 U.S. 270	27
Rose v. Lundy (1982) ___ U.S. ___ 102 S.Ct. 1198	27,35
Sumner v. Mata (1981) 449 U.S. 539	37,41
Sumner v. Mata (1982) ___ U.S. ___, 102 S.Ct. 1303	37,40

TABLE OF AUTHORITIES
Continued

Cases

Federal:	Page
Taylor v. Lombard (2d Cir. 1979) 606 F.2d 271	40
United States v. Addonizio (1979) 442 U.S. 178	26
United States v. Dujanovic (9th Cir. 1973) 486 F.2d 465	42
United States v. Frady (1982) ___ U.S. ___, 102 S.Ct. 1584	41
United States v. Lawrence (4th Cir. 1979) 605 F.2d 1321	38
United States v. Price (9th Cir. 1973) 474 F.2d 1223	37-38
Wainwright v. Sykes (1977) 433 U.S. 72	29,30,31, 34
Walker v. Loggins (9th Cir. 1979) 608 F.2d 731	34
Younger v. Harris (1971) 401 U.S. 37	41
State:	
In re Byrnes (1945) 26 Cal.2d 824	26
In re Dixon (1953) 41 Cal.2d 756	26
In re Terry (1971) 4 Cal.3d 911	26
In re Shipp (1965) 62 Cal.2d 547	26

TABLE OF AUTHORITIES
Continued

Cases

State:	Page
In re Streeter (1967) 61 Cal.2d 47	26
In re Waltreus (1965) 62 Cal.2d 218	18,22,23, 25,26
In re Winchester (1960) 53 Cal.2d 528	26
Menchaca v. Helms Bakeries, Inc. (1968) 68 Cal.2d 535	24
People v. McDaniel (1976) 16 Cal.3d 156	32,43

Constitutions

U.S. Const., Sixth Amend.	10
U.S. Const., Fourteenth Amend.	10-11

Statutes

Federal:	
28 U.S.C.	
§ 1254	9
§ 2254	11-13,27, 37
State:	
Cal. Pen. Code	
§ 211	14,16,20
§ 245	14,16,20

TABLE OF AUTHORITIES
Continued

Court Rules

Federal:	Page
Fed. Rules Civ. Proc., rule 52	13,14,40
State:	
Cal. Rules of Court, rule 28	15-16,24

OPINIONS BELOW

The opinion of the Court of Appeals is set forth as Appendix A to this petition and is reported as Maxwell v. Sumner (9th Cir. 1982) 673 F.2d 1031. The unreported opinion of the District Court for the Central District of California appears as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 25, 1982. A timely petition for rehearing and for rehearing en banc was denied on April 21, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 United States Code section 1254(1).

* * * *

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, in relevant part:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

28 United States Code, section 2254, in relevant part:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of

the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determation has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

Rule 52(a), Federal Rules of Civil Procedure, in relevant part:

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness. . . ."

California Penal Code section 211:

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accompanied by means of force or fear."

California Penal Code section 245, in relevant part:

"(b) Every person who commits an assault with a deadly weapon or instrument or by any means likely to produce great bodily injury upon the person of a peace officer or fireman, and who knows or reasonably should know that such victim is a peace officer or fireman engaged in the performance of his duties, when such peace officer or fireman is engaged in the performance of his duties shall be punished by imprisonment in the state prison . . . ."

* * * *

Rule 28, California Rules of Court, in relevant part:

"Hearing in Supreme Court

". . . .

"(d)

". . . .

"(2) Each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of its filing.

"(3) The petition shall be a single document including a brief in support of the request for hearing. All contentions in support of the petition shall be included therein, including all legal authorities and argument. If a party files an answer to the petition, it shall be a single document which includes all of his contentions in opposition to the petition. No authorities or argument may be incorporated by reference from another document into the petition, or into the answer, except that the petition or answer may incorporate by reference specified portions of a petition for hearing or answer filed in the Supreme Court by another party

in the same case, or filed in the Supreme Court in a connected case wherein a petition for hearing is also pending. No discussion of authorities or argument, however denominated, may be annexed to or filed with the petition or answer, except where such annexed material is page - numbered consecutively with the body of the petition or answer and the total length, including the annexed material, does not exceed the limit established in paragraph (4)."

STATEMENT OF THE CASE

Respondent was charged in an information filed by the District Attorney of Los Angeles County, California, with two counts of robbery, in violation of California Penal Code section 211, and with two counts of assault with a deadly weapon on a peace officer, in violation of California Penal Code section 245(b). (C.T. pp. 1-5.)[1/]

---

1. "C.T." refers to the clerk's transcript prepared by the state trial court for respondent's state appeal. As hereinafter used, "R.T." refers to the reporter's transcript of proceedings in

Continued

Respondent's pretrial motions to relieve his court-appointed attorney and motion to proceed in propria persona were denied. The state trial court found that respondent's motions, made on the day of trial, were untimely and made for the purpose of delay, and further found that respondent's conduct in interrupting the trial court supported a conclusion that respondent could not properly act as his own counsel. (C.T. p. 29; R.T. pp. 48-62.)

On July 30, 1975, following a conviction by a jury on all counts, respondent was sentenced to state prison for the term prescribed by law. (C.T. p. 99.) Respondent took an appeal to the California Court of Appeal, Second

---

the state trial court, and "C.R." refers to the clerk's record before the United States Court of Appeals for the Ninth Circuit. Pursuant to the rules of that Circuit, each document in the record was identified by a number and paginated separately. The records of the state court proceedings were lodged with the district court in connection with respondent's petition for writ of habeas corpus.

Appellate District, Division Five. He alleged, inter alia, that his motion to proceed in propria persona should have been granted by the trial court. The California Court of Appeal affirmed the judgment. Thereafter, respondent petitioned the California Supreme Court for hearing on direct appeal, raising several issues but not raising the self-representation issue. The California Supreme Court denied hearing, and the state court judgment became final.[2/]

On August 8, 1977, respondent petitioned the California Supreme Court for a writ of habeas corpus, raising the self-representation issue. On October 6, 1977, that Court denied the petition, citing In re Waltreus, 62 Cal.2d 218, 397 P.2d 1001, 42 Cal.Rptr. 9, cert. denied, 382 U.S. 853 (1965). (C.R. "4," p. 12.)

Thereafter, respondent filed a petition for writ of habeas corpus in the

---

2. The opinion of the California Court of Appeal, as well as respondent's appellate brief and petition for hearing in the California Supreme Court, were lodged with the United States District Court. (C.R. "5," p. 1.)

United States District Court for the Central District of California, and a conditional writ issued on May 14, 1979. (C.R. "52," pp. 1-2.) On July 10, 1980, on appeal to the United States Court of Appeals for the Ninth Circuit, the district court was reversed for failure to conduct a de novo review of the record following objections to the magistrate's report and recommendation. (U.S.D.C., 9th Cir. No. 79-2600; Appen. B, p. 18.) Upon remand to the district court, a de novo evidentiary hearing was ordered; however, respondent elected not to present additional evidence. On April 29, 1981, the district court entered an order conditionally granting the petition for writ of habeas corpus. (C.R. "90," pp. 1-2.)

Petitioner filed a timely notice of appeal and, on February 25, 1982, the Court of Appeals affirmed the judgment of the district court. On April 21, 1982, the Court of Appeals amended its opinion and denied petitioner's petition for rehearing and for rehearing en banc. (Maxwell v. Sumner (9th Cir. 1982) 673 F.2d 1031; Appen. A.) On May 11, 1982, the Court of Appeals granted petitioner's

motion for stay of the mandate pending timely filing of a Petition for Writ of Certiorari in this Court.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

RESPONDENT'S FAILURE TO RAISE THE QUESTION OF SELF-REPRESENTATION IN HIS PETITION FOR HEARING TO THE CALIFORNIA SUPREME COURT CONSTITUTES A WAIVER BARRING FEDERAL HABEAS CORPUS RELIEF

Respondent was tried and convicted by a jury of two counts of robbery, in violation of California Penal Code section 211, and two counts of assault with a deadly weapon on a peace officer, in violation of California Penal Code section 245(b). (C.T. pp. 88-89.) The judgment was affirmed by the California Court of Appeal. Thereafter, respondent sought a hearing in the California Supreme Court, but did not raise the self-representation issue later raised in the federal courts. Hearing was denied and the judgment became final. On August 8, 1977, more than two years after his conviction, respondent petitioned the California Supreme Court for a writ of

habeas corpus raising the self-representation issue for the first time in that court. The petition was denied. (C.R. "4," p. 12; see also, discussion in Maxwell v. Sumner (9th Cir. 1982) 673 F.2d 1031, 1033.)

Petitioner submits that notwithstanding respondent's attempt to exhaust his state court remedies by raising his claim in a collateral attack on a final judgment, his failure to perfect his claim on direct appeal, as required by state rules of procedure, constitutes a waiver of the claim, barring federal habeas corpus relief.

A. Respondent Failed to Perfect his Claim in Accordance With California State Procedures

In the opinion below, the Court of Appeals acknowledged the well-established rule that federal habeas corpus review is barred where a state court's denial of a claim rests on a procedural default, not on the merits of the claim. (Maxwell v. Sumner, supra, at pp. 1033-1034.) As the Court stated: "For reasons of comity and respect for the function of procedural rules in our judicial system, courts view the failure to present a

federal claim in accordance with certain state procedural rules to be an independent and adequate ground for a state court judgment." (Id., at p. 1034.) Thus, respondent's claim is not reviewable in the federal courts unless he had complied with California procedure in presenting a claim for review on the merits to the California Supreme Court and unless that court had rejected respondent's claim on the merits.

Having correctly stated the rule, the Court of Appeals incorrectly concluded that the California Supreme Court had considered and rejected respondent's claim on the merits. This conclusion is contrary to the conclusions of the district court judgment that the Court of Appeals purported to affirm. (Appen. B, pp. 19-22.) The Court of Appeals noted that when the California Supreme Court had denied respondent's petition for habeas corpus relief, it cited In re Waltreus, 62 Cal.2d 218, 397 P.2d 1001, 42 Cal.Rptr. 9, cert. denied, 382 U.S. 853, (1965), a case where a petition for a writ of habeas corpus was denied after the claim had been considered and rejected on direct appeal. The Court of Appeals concluded that the

citation to Waltreus implied that the California Supreme Court had considered and rejected respondent's claim on direct appeal by somehow acknowledging that the state Court of Appeal had considered the claim. (Maxwell v. Sumner, supra, at pp. 1034-1035.) Although as heretofore noted, respondsnt had failed to raise the instant claim in the body of his petition for hearing presented to the California Supreme Court on direct appeal, the Court of Appeals reasoned that the California Supreme Court must have passed upon that claim since the claim was discussed in the state Court of Appeal opinion which was attached as an appendix to the petition for hearing in the California Supreme Court. (Id., at p. 1034, fn. 1.)

The Court of Appeals' interpretation of the California proceedings is incorrect and imposes an unreasonable burden on the state courts. On direct appeal, unless a petition for hearing is granted, the California Supreme Court does not consider any issue not raised within the body of the petition. Although a petition for hearing to the California Supreme Court must contain, as an appendix, a copy of any intermediate

appellate court opinion (rule 28(d)(2), Cal. Rules of Court), inclusion of that appendix does not automatically raise any issues discussed in the intermediate appellate opinion. "The petition shall be a single document including a brief in support of the request for hearing. All contentions in support of the petition shall be included therein, including all legal authorities and argument. . . ." (Rule 28(d)(3), Cal. Rules of Court.) The Court of Appeals' conclusion that respondent's claim was considered on the merits by the California Supreme Court would be correct only if the California Supreme Court had granted a hearing on direct appeal. When a hearing is granted, any intermediate appellate decision is ordered vacated and the case is placed in the same procedural posture as it was when a notice of appeal was filed in the trial court. (See Menchaca v. Helms Bakeries, Inc., 68 Cal.2d 535, 541, fn. 1, 439 P.2d 903, 907, fn. 1; 67 Cal.Rptr. 775, 779, fn. 1 (1968).) Thus, when hearing is granted by the California Supreme Court, any issue preserved for appeal in the trial court may be briefed, argued and decided. However, when the California

Supreme Court denies a petition for hearing, it passes only upon the issues raised in the brief in support of the petition, and does not otherwise rule on matters discussed within the state Court of Appeal opinion. (See rule 28, Cal. Rules of Court.)

Heretofore, federal courts have honored this California rule. In Garrison v. McCarthy (9th Cir. 1981) 653 F.2d 374, the Court of Appeals expressly ruled that where an issue is raised on direct appeal to the California Court of Appeal but is not among issues raised in a subsequent petition for hearing to the California Supreme Court, there is a failure to exhaust state court remedies. (Id., at p. 376; see also Gonzales v. Stone (9th Cir. 1976) 546 F.2d 807, 808, fn. 2.)

If the California Supreme Court was barred by its own rules of procedure from considering, on direct appeal, a claim not raised in the brief in support of respondent's petition for hearing, it follows that the citation to In re Waltreus, supra, in the order denying habeas corpus relief to respondent could not have been the California Supreme Court's shorthand for saying that

respondent's claim had been rejected on the merits. Indeed, the line of California decisions of which In re Waltreus is a part stands for the proposition that habeas corpus may not function either as a second appeal or as a substitute for appeal. A petitioner waives an issue which could have been raised on direct appeal where it is not so raised. (See In re Terry, 4 Cal.3d 911, 927; 484 P.2d 1375, 1387; 95 Cal.Rptr. 31, 43 (1971); In re Streeter, 61 Cal.2d 47, 52; 423 P.2d 976, 979; 56 Cal.Rptr. 824, 827 (1967); In re Shipp, 62 Cal.2d 547, 552; 399 P.2d 571, 575; 43 Cal.Rptr. 3, 7 (1965); In re Winchester, 53 Cal.2d 528, 532; 348 P.2d 904, 907; 2 Cal.Rptr. 296, 299 (1960); In re Dixon, 41 Cal.2d 756, 759; 264 P.2d 513, 514-515 (1953); In re Byrnes, 26 Cal.2d 824, 827; 161 P.2d 376, 377 (1945).) The federal rule is similar to California's. (See, e.g., United States v. Addonizio (1979) 442 U.S. 178, 184-185.)

The Court of Appeals' conclusion that respondent's claim was rejected on the merits is not supported by California authority and cannot be reconciled with the Court of Appeals' own decision in

Garrison v. McCarthy, supra. This misinterpretation of state procedure strikes at the very heart of the doctrine of comity by presuming to tell a state court that it has considered an issue that it has not considered and could not consider according to its own rules of procedure. In so doing, the Court of Appeals has impermissibly broadened the remedy of federal habeas corpus by finding that a state prisoner has exhausted his state court remedies even where the prisoner has not complied with state procedures necessary to preserve his claim.

B. Respondent's Failure to Perfect his Claim in Accordance with California Procedural Rules Bars Federal Habeas Corpus Relief

As a matter of comity, federal courts will not grant a state prisoner habeas corpus relief unless the prisoner exhausts state court remedies. (28 U.S.C. § 2254(b).) State court remedies are not exhausted unless all claims have been fairly presented to the state courts (Rose v. Lundy (1982) ___ U.S. ___, 102 S.Ct. 1198, 1199-1205; Picard v. Connor (1971) 404 U.S. 270, 275), and the state's highest tribunal has disposed of the claim on the merits (see Harris v. Superior

Court (9th Cir. 1974) 500 F.2d 1124, 1128 (en banc), cert. denied, 420 U.S. 973 (1975)).

This Court has placed great importance on the concept of finality of judgment in state court proceedings, and has repeatedly limited the ability of federal courts to interfere freely with final state court judgments absent a demonstration of cause or showing of actual prejudice. (Engle v. Isaac (1982) ___ U.S. ___, 102 S.Ct. 1558; Francis v. Henderson (1976) 425 U.S. 536, 542.) In so doing, this Court has established a body of law outlining the concept of waiver resulting in a forfeiture of the right to seek federal habeas corpus relief. In Estelle v. Williams (1976) 425 U.S. 501, this Court held that trial counsel's failure to object to a trial of a state defendant while in jail clothes was a bar to later seeking federal habeas corpus relief. (Id., at pp. 509-513.) In Francis v. Henderson, supra, this Court held that failure to make a timely challenge to the composition of a state grand jury waived federal habeas corpus relief absent a showing of actual prejudice. (Id., at p. 542.) In

Wainwright v. Sykes (1977) 433 U.S. 72, this Court held that federal habeas corpus relief was barred by the failure of a state defendant to comply with a state contemporaneous objection rule relating to objections under the rule of Miranda v. Arizona (1966) 384 U.S. 436. (433 U.S. at pp. 86-87.) This Court further held that once a waiver is shown, a federal habeas corpus petitioner may seek relief only if he can demonstrate both cause and prejudice attendant to the state procedural waiver. (Id., at pp. 87, 90-91.)

In the recent case of Engle v. Isaac, supra, ____ U.S. ___, 102 S.Ct. 1558, this Court considered the holding of Wainwright v. Sykes, supra, in the context of a federal habeas corpus action brought by a state defendant who had failed to comply with a state rule mandating contemporaneous objections to jury instructions. This Court strongly reaffirmed the principle that when a procedural default bars state litigation of a constitutional claim, a state defendant may not obtain federal habeas corpus relief absent a showing of both cause for the default and actual prejudice. (Id., at pp. 1570-1572.) Clearly, principles of comity

warrant applying the Sykes rule whether the procedural default occurred at trial or on appeal in the state courts.

Circuit courts have repeatedly applied this Court's reasoning in cases where the waiver occurred because a claim was not raised as required by state procedural rules. In Forman v. Smith (2d Cir. 1980) 633 F.2d 634, a state prisoner sought federal habeas corpus relief for an alleged violation of his Sixth Amendment rights, although he had not raised the issue on direct appeal in the state courts and the state's highest court had found the issue to be barred for lack of proper procedural presentation. (Id., at pp. 635-636.) In reversing an order granting a writ of habeas corpus, the Court of Appeals concluded as follows:

> "Our review of the origins of the cause and prejudice standard and the reasons for its application in [Wainwright v.] Sykes to forfeitures of specific claims at trial persuades us that that standard also applies to forfeitures of specific claims on appeal. . . ." (Id., at p. 640.)

Similarly, in Carothers v. Rhay (9th Cir. 1979) 594 F.2d 225, failure to

raise an issue on direct appeal where such a failure is a bar to later collateral attack under state law, constitutes an adequate state procedural ground under the theory of Wainwright v. Sykes, supra, to bar federal review of the merits. (Id., at p. 228.) In Evans v. Maggio (5th Cir. 1977) 557 F.2d 430, the Court of Appeals applied the reasoning of Francis v. Henderson, supra, in requiring that a state defendant show cause for the waiver or actual prejudice as a prerequisite to habeas corpus relief where an issue was not raised on direct appeal in the state courts and failure to so raise the issue barred later habeas corpus relief in the state court. (Id., at pp. 431-434.)

The self-representation claim presented by respondent was identified by respondent as an issue at the time he initiated his appeal to the California Court of Appeal and was subsequently abandoned by respondent when petitioning for hearing in the California Supreme Court. By incorrectly concluding that the issue was decided by the California Supreme Court, the Court of Appeals failed to deal with the district court's analysis that respondent had cause excusing him

from raising the issue in the California Supreme Court. It is submitted that the district court was also in error. The district court reasoned that it would have been futile to raise the self-representation issue in light of a state court holding that Faretta v. California (1975) 422 U.S. 806, was not retroactive. (See People v. McDaniel (1976) 16 Cal.3d 156; Appen. B, pp. 20-22.)

Contrary to the conclusion of the district court, futility does not constitute "cause" for failing to raise an issue in the California Supreme Court, and in any event, the concept does not apply in the instant case. As this Court recently held:

> "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." (Engle v. Isaac, supra, at p. 1572.)

Even a later discovery of a constitutional defect unknown at the time of trial does not automatically constitute "cause" for bypassing a state remedy, and the federal courts are precluded from considering

whether a defect rendered the original trial fundamentally unfair where, as here, the record establishes that respondent's claim was known to him at trial. (Id., at pp. 1573-1574.)[3/]

Moreover, in light of the fact that the Ninth Circuit recognized a right of self-representation prior to Faretta v. California, supra (see Bittaker v. Enomoto (9th Cir. 1978) 587 F.2d 400, 401), there is no reasonable basis to conclude that it would have been futile to raise the self-representation issue in the petition for hearing in the California Supreme Court. That Court has never considered the impact of the Ninth Circuit self-representation cases on California law, and the Ninth Circuit has maintained that it need not consider the retroactivity of Faretta v.

---

3. This Court recently rejected a Court of Appeals conclusion that cause may be shown by such an unanticipated change in law, and remanded the case for consideration in light of Engle v. Isaac, supra. (Myers v. Washington (1981) 646 F.2d 355, cert. granted and remanded sub. nom. Washington v. Myers (Apr. 19, 1982) ___ U.S. ___, 102 S.Ct. ___.)

California in light of its earlier opinions recognizing a right of self-representation. (See Walker v. Loggins (9th Cir. 1979) 608 F.2d 731, 734; Bittaker v. Enomoto, supra, at p. 401, cert. den. 441 U.S. 913 (1979).)

Assuming, arguendo, that respondent had established cause for failure to properly present his claim in the state courts, federal habeas corpus relief is barred absent a showing of actual prejudice. (Engle v. Isaac, supra, at pp. 1570-1572, 1575; Wainwright v. Sykes, supra, 433 U.S. at p. 91; Francis v. Henderson, supra, 425 U.S. at p. 542; Forman v. Smith, supra, 633 F.2d at p. 642.) The district court held that prejudice is presumed where there is a denial of a request for self-representation. (Appen. B, pp. 25-26.) However, it is well-settled that where a waiver has occurred in the state appellate process, there is no presumption that prejudice resulted from denial of a constitutional right. (Davis v. United States (1973) 411 U.S. 233, 245.) A federal writ of habeas corpus may not issue unless actual prejudice is demonstrated. (See discussion in Forman v. Smith, supra, at

pp. 641-642.) Where, as here, respondent cannot point to any significant harm as a result of his representation by a skilled and experienced lawyer in lieu of himself, there is no evidence of actual prejudice.

Petitioner submits that the exercise of federal habeas corpus jurisdiction to assess the validity of a state criminal conviction is necessarily limited by the doctrine of comity. In an effort to maintain the dignity of both the state and federal court systems within their separate spheres, federal habeas corpus should not lie where a state defendant who has demonstrated neither cause nor prejudice, has bypassed a state remedy available on direct appeal and thus bypassed the only procedure available for the state's highest court to review his claim on the merits. (See Rose v. Lundy, supra, at pp. 1199-1205.)

* * * *

II

THE FEDERAL COURTS BELOW ERRED IN MAKING FINDINGS CONTRARY TO THE STATE TRIAL COURT WHERE THE FINDINGS WERE BASED ONLY ON A REVIEW OF THE STATE TRIAL COURT TRANSCRIPTS

The state trial court denied respondent's motion to proceed in propria persona for two reasons: It found that respondent's motion, made on the day of trial, was untimely and made for the purpose of delay. It also found that respondent's "outlandish conduct" warranted rejection of his request to act as counsel. (R.T. p. 62.) Respondent's first request to represent himself came on the day of trial and had not previously been brought to the attention of the trial court through written or oral motions. (C.T. p. 29; R.T. p. 48.) Additionally, the record reveals that respondent repeatedly interrupted the trial court, and engaged in conduct sufficient to provoke counsel for a codefendant to move for a severance. (R.T. p. 62; C.R. "50," p. 21.) Despite the record, the United States District Court rejected the state court's conclusion and, based solely on a review of state court transcripts, imposed

its own interpretation of the facts over that of the state trial and appellate courts. (Appen. B, pp. 23-25.)

The authority of a federal court to reject factual findings by the state trial and appellate courts is limited by 28 U.S.C. section 2254(d). Under that section, the findings of the state trial court and the state court of appeal that respondent engaged in disruptive conduct on the day of trial, and that the motion for self-representation was intended for delay are presumptively correct. (Sumner v. Mata (1981) 449 U.S. 539.) The District Court rejected these presumptively correct findings on the ground that they were not fairly supported by the record. (C.R. "91," pp. 6-7.) Although section 2254(d) permits such a conclusion where appropriate, it is clear that the District Court failed in the instant case to give the state court's factual findings the proper presumption of correctness. (See discussion in Sumner v. Mata (1982) ___ U.S. ___, 102 S.Ct. 1303.)

A motion for self-representation is timely only if made within a reasonable time prior to the commencement of trial. (United States v. Price (9th Cir. 1973)

474 F.2d 1223, 1325, fn. 2.) The determination of timeliness is a matter peculiarly within the trial court's discretion. (United States v. Lawrence (4th Cir. 1979) 605 F.2d 1321, 1324-1325.) In the instant case, considering the seriousness of the charges the lack of any substantial evidence of inadequate representation, and the joinder of a codefendant for trial, it cannot be said that the state trial court abused its discretion in denying a motion made on the day of trial. Similarly, the District Court erred in giving a different interpretation to the factual record of respondent's conduct in the state trial court. Notably, this interpretation was based solely on a cold reading of the state trial transcripts and not on any independent evidence gathering process in the federal courts. Such a "stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (Broadcast Music v.

Havana Madrid Restaurant Corp. (2d Cir. 1949) 175 F.2d 77, 80.) In light of the fact that a trial court has authority to deny a self-representation motion where a defendant's disruptive or outlandish behavior justifies the denial (see Faretta v. California, supra, 422 U.S. 806, 834-835, fn. 46), the District Court should have deferred to the state trial court's factual conclusions.

On appeal, the Court of Appeals characterized the District Court as a fact-finding tribunal and declined to overturn the findings of that court unless they were "clearly erroneous." (Maxwell v. Sumner, supra, at p. 1036.) While acknowledging a division in the circuits, the Court of Appeals held that rule 52(a), Federal Rules of Civil Procedure, requires applying the "clearly erroneous" standard to district court findings based solely on state documents. The Court of Appeals reasoned that the district court "is in a better position to judge whether a defendant's behavior was outrageous or his motion for self-representation was made with the intent to delay the trial." (Maxwell v. Sumner, supra, at p. 1036, fn. 5.) Petitioner submits that there is

no justification to apply the federal "clearly erroneous" standard to findings of a district court where the findings are based solely on a review of state transcripts. In such a situation, the District Court does not act as a fact-finding tribunal. Rather, the District Court acts under the "presumption of correctness" standard of review imposed by 28 U.S.C. section 2254(d). (See discussion in Sumner v. Mata, supra (1982) ___ U.S. ___, 102 S.Ct. at pp. 1304-1307.) Where a district court fails to accord state findings a presumption of correctness, the error is compounded if the Court of Appeals thereafter presumes the district court findings to be correct.

The standard employed by the Court of Appeals presumes that the District Court heard testimony since the standard calls for ". . . due regard [to] be given to the opportunity of the trial court to judge the credibility of the witnesses." (Rule 52(a), Fed. Rules Civ. Proc.) However, the District Court had no opportunity to judge the credibility of witnesses since no witnesses were presented. In Taylor v. Lombard (2d Cir. 1979) 606 F.2d 271, 372, cert. den. 445

U.S. 946, it was expressly held that the clearly erroneous standard does not apply to District Court findings based soley on a review of the state record in habeas corpus proceedings. Where a state or federal prisoner launches a collateral attack on a final judgment, society's legitimate interest in the integrity of the judgment renders the approach taken by the Court of Appeals inappropriate. (See, United States v. Frady (1982) ___ U.S.___, 102 S.Ct. 1584, 1592-1593; Henderson v. Kibbe (1977) 431 U.S. 145, 154.) Considering the principles of comity underlying the statutory presumption that state court findings are correct (see Sumner v. Mota, supra, 449 U.S. at pp. 545-552; Younger v. Harris (1971) 401 U.S. 37, 53), the Court of Appeals erred in concluding that the District Court is in the better position to judge respondent's conduct.

* * * *

III

THE DECISION OF THE COURT OF APPEALS IMPERMISSIBLY APPLIES THE ABSOLUTE RIGHT OF SELF-REPRESENTATION RETROACTIVELY TO A TRIAL COMMENCING PRIOR TO THIS COURT'S DECISION IN FARETTA V. CALIFORNIA

In the opinion below, the Court of Appeals ostensibly applied its own decisional law in finding that respondent had a right to proceed in propria persona. (Maxwell v. Sumner, supra, at p. 1035.) However, the Court neglected to deal with the contention that denial of respondent's request was consistent with prior Ninth Circuit law which did not include an absolute right to self-representation. (See United States v. Dujanovic (9th Cir. 1973) 486 F.2d 182, 186.) The Court of Appeals in effect characterizes the Ninth Circuit right to self-representation as absolute. This holding is in conflict with Ninth Circuit decisional law and thus has the effect of retroactively applying the rule of Faretta v. California, supra (1975) 422 U.S. 806, as if it had previously been the rule in the Ninth Circuit.

There is a strong split of authority in both state and federal courts

on whether Faretta v. California should be applied retroactively. (Compare Martin v. Wyrick (8th Cir. 1978) 568 F.2d 583, 587; People v. McDaniel, supra, 16 Cal.3d 156, 545 P.2d 843, 127 Cal.Rptr. 467, cert. denied 429 U.S. 847 (1976) (holding Faretta not retroactive) with Chapman v. United States (5th Cir. 1977) 553 F.2d 886, 889-890; People v. Holcomb (Mich. 1975) 395 Mich. 326, 235 N.W.2d 343, 347, fn. 7 (applying Faretta retroactively).) Petitioner submits that a writ of certiorari should be granted to enable this Court to define the nature of any right of self-representation that state courts must apply to cases arising prior to the decision in Faretta v. California, supra.

* * * *

CONCLUSION

For the foregoing reasons, petitioner submits that a writ of certiorari should issue to review the decision of the United States Courts of Appeals for the Ninth Circuit.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant Attorney General--Criminal Division
S. CLARK MOORE, Assistant Attorney General
EDWARD T. FOGEL, Deputy Attorney General
SANDY R. KRIEGLER, Deputy Attorney General
MARK ALAN HART, Deputy Attorney General and Attorney of Record

Attorneys for Petitioner

APPENDIX A

Anthony Paul MAXWELL,
Petitioner-Appellee,

v.

G. W. SUMNER, Warden, San Quentin Prison, Respondent-Appellant.

No. 81-5349.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 1981.

Decided Feb. 25, 1982.

As Amended on Denial of Rehearing and Rehearing En Banc April 21, 1982.

Before ANDERSON and NORRIS, Circuit Judges, and MUECKE,* District Judge.

NORRIS, Circuit Judge:

This is an appeal by the Warden of San Quentin prison from an order of the district court granting appellee Anthony Paul Maxwell's petition for writ of habeas corpus.

In July, 1975, Maxwell was convicted in California of robbery and assault with a deadly weapon. Maxwell appealed his conviction to the California

*The Honorable C. A. Muecke, Chief United States District Judge for the District of Arizona, sitting by designation.

Court of Appeal, claiming, inter alia, that the trial court erred in denying his motion to proceed in propria persona. After the Court of Appeal affirmed his conviction, Maxwell unsuccessfully petitioned for a hearing in the California Supreme Court.

Maxwell then raised his self-representation claim in a petition to the California Supreme Court for a writ of habeas corpus. The petition was denied with a citation to In re Waltreus, 62 Cal.2d 218, 225, 397 P.2d 1001, 1005, 42 Cal.Rptr. 9, 13, cert. denied, 382 U.S. 853, 86 S.Ct. 103, 15 L.Ed.2d 92 (1965). The instant petition followed. After reviewing the record, the district court ruled that the state trial court erred in denying Maxwell's motion to proceed in propria persona. The district court found that Maxwell's request for self-representation was neither "outlandish" nor made for the purpose of delay, as the state trial court had concluded. Therefore, in light of Faretta v. California, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 2541-42, 45 L.Ed.2d 562 (1975), which holds that the Sixth Amendment affords every criminal defendant the right "knowingly and

intelligently" to forgo his right to counsel, the district court granted Maxwell's petition for writ of habeas corpus.

Appellant raises three issues on appeal. First, he argues that Maxwell waived his right to assert his self-representation claim in a federal habeas petition by failing to raise the issue on direct appeal to the California Supreme Court. Second, appellant asserts that even if no waiver occurred, Maxwell had no right of self-representation at the time of his trial because Faretta was decided after Maxwell's conviction and is not retroactive. Finally, appellant contends that Maxwell's conduct at trial justified the state court's denial of his motion to proceed in propria persona.

I.

In his petition for a hearing in the California Supreme Court, Maxwell did not advance the trial court's denial of his propria persona motion as a reason for the Supreme Court to hear his case. Relying on Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), appellant contends that by this omission Maxwell waives his right to raise the

self-representation issue in state (and therefore federal) habeas corpus.

Failure to comply with state procedural rules may bar federal habeas review of the underlying federal claim, absent a showing of "cause" for the failure and actual "prejudice" resulting from the alleged constitutional violation. Wainwright v. Sykes, supra; Myers v. Washington, 646 F.2d 355 (9th Cir. 1981). In Sykes, petitioner had failed at trial and apparently on direct appeal to challenge the admissibility of statements allegedly obtained in violation of his Miranda rights. 433 U.S. at 75 & n.3, 97 S.Ct. at 2500 & n.3. He apparently first challenged the use of the statements in an unsuccessful state habeas petition. Id. The Supreme Court held that petitioner's failure to comply at trial with the state's contemporaneous-objection rule constituted an "independent and adequate state ground" for the state court judgment, barring federal habeas review unless petitioner could show cause and prejudice. Id. at 86-87, 97 S.Ct. at 2506-07.

Circuit courts have applied the Sykes rule to procedural defaults at the

appellate level. Myers v. Washington, supra; Forman v. Smith, 633 F.2d 634 (2nd Cir. 1980), cert. denied, 450 U.S. 1001, 101 S.Ct. 1710, 68 L.Ed.2d 204 (1981). In Myers, the Washington Supreme Court had rejected a state prisoner's habeas petition because the petitioner had failed to comply with a state rule requiring an issue to be raised on direct appeal before it could be raised as grounds for collateral attack. 646 F.2d at 357. We held that the procedural default was an independent and adequate state ground precluding federal habeas review of all but one issue, for which petitioner had shown cause and prejudice. Id.

In both Wainwright and Myers, federal habeas review was barred because the state court's denial of petitioner's federal claim rested on a procedural default, not on the merits of the claim. For reasons of comity and respect for the function of procedural rules in our judicial system, courts view the failure to present a federal claim in accordance with certain state procedural rules to be an independent and adequate ground for a state court judgment. See County Court v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213,

2223, 60 L.Ed.2d 777 (1979); Sykes, 433 U.S. at 88-90, 97 S.Ct. at 2507-08. "But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." County Court v. Allen, 442 U.S. at 154, 99 S.Ct. at 2223.

Sykes and Myers are inapplicable to this case because no independent and adequate state procedural ground exists; the state courts denied Maxwell's federal claim on the merits. Maxwell's state habeas petition was denied with a citation to In re Waltreus, supra, which involved a state habeas petition raising various claims of trial court error. The California Supreme Court denied the petition, stating that "[t]hese arguments were rejected on appeal, and habeas corpus ordinarily cannot serve as a second appeal." 62 Cal.2d at 225, 397 P.2d 1001, 42 Cal.Rptr. 9. Waltreus, thus holds that arguments rejected on appeal will not be reviewed again in habeas; by citing Waltreus in its denial of Maxwell's habeas petition, the California Supreme Court stated by clear implication that Maxwell's

self-representation claim had been considered and rejected on the merits on direct appeal.

Appellant interprets Waltreus as holding that California habeas corpus relief is barred if the issue on which the prisoner seeks relief was not raised on direct appeal to the California Supreme Court. We believe appellant misreads Waltreus. Appellant's interpretation -- that a state prisoner waives his right to habeas review if he does not raise the habeas issue on direct appeal to the California Supreme Court -- assumes that California has a rule similar to the rule relied on by the Washington Supreme Court in Myers. We find no such rule.[1] More

1. Moreover, we believe that Maxwell effectively raised his self-representation claim to the California Supreme Court. The purpose of a petition for a hearing in the California Supreme Court is to convince that court to exercise its discretion to hear the case. See Cal.Civ. & Crim.Court Rules, App. Rules 28(a), 29 (West 1981). Yet if a claim has been briefed and argued before the court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim. Menchaca v. Helms Bakeries, Inc., 68 Cal.2d 535, 541 n.1, 439 P.2d 903, 907 n.1, 67 Cal.Rptr. 775, 779 n.1 (1968). Every petition for a hearing in the California Supreme Court

Continued

importantly, if such a rule does exist, the California Supreme Court did not invoke it in denying Maxwell's habeas petition; rather, the court indicated, by citing Waltreus, that petitioner's claim had been rejected on its merits by the California Court of Appeal. We thus find no independent and adequate state procedural ground for denying Maxwell's self-representation claim,[2] and we hold

Footnote continued:
must contain a copy of the court of appeal's opinion. Cal.Civ. & Crim.Court Rules App. Rule 28(d)(2) (West 1981). More importantly, when the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition." Menchaca, 678 Cal.2d at 541 n.1, 439 P.2d at 907 n.1, 67 Cal.Rptr. at 779 n.1 (1968); see also Chavez v. Sargent, 52 Cal.2d 162, 186 n.10, 339 P.2d 801, 817 n.10 (1959). Thus, we believe that Maxwell's petition to the California Supreme Court effectively presented his self-representation claim for review in that court.

2. Nor do we find that petitioner failed to exhaust his state remedies. By raising the constitutional issue before the state trial court, then the court of appeal, and finally by petitioning the state supreme court, first for a hearing and then for a writ of habeas corpus, petitioner has

Continued

that Maxwell is not barred from seeking federal habeas relief.[3]

II

The State next contends that Faretta does not apply retroactively and that Maxwell therefore had no right of self-representation at the time of his trial.

In Faretta, the Court held that an accused has a Sixth Amendment right to choose "knowingly and intelligently" to represent himself at trial. Under pre-Faretta Ninth Circuit law, a state

Footnote continued:
clearly given the state of California an initial "opportunity to pass upon and correct" the alleged violation of his federal rights. Fay v. Noia, 372 U.S. 391, 438, 83 S.Ct. 822, 848, 9 L.Ed.2d 837 (1963); see Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). More importantly, California has no procedure available under which petitioner could have raised the self-representation claim again, see In re Waltreus, supra, and federal habeas review is thus proper. 28 U.S.C. § 2254(c).

3. The district court held that Sykes applied to Maxwell's habeas petition, but that there was sufficient "cause" and "prejuice" to overcome the independent and adequate state ground otherwise barring federal habeas relief. Since we hold that Sykes is inapplicable to the instant case, we do not reach the issue of "cause" and "prejudice."

defendant already had a constitutional right of self-representation equivalent to the right recognized in Faretta. Bittaker v. Enomoto, 587 F.2d 400, 401-402 (9th Cir. 1978), cert. denied, 441 U.S. 913, 99 S.Ct. 2013, 60 L.Ed.2d 386 (1979). Thus, Maxwell had a right to proceed in propria persona, even though his trial occurred before Faretta was decided.

III

Finally, appellant contends that the state trial court's denial of Maxwell's request to proceed in propria persona was justified by Maxwell's disruptive behavior during trial, by the lateness of Maxwell's motion, and by Maxwell's intent to use the motion for the purpose of delay.

The district court in a habeas corpus proceeding must presume that the state trial court's factual determinations are correct, 28 U.S.C. § 2254(d), unless a "determination is not fairly supported by the record." 28 U.S.C. § 2254(d)(8). To withstand appellate scrutiny, the federal habeas court must state its reasons for concluding that the state finding was "not fairly supported by the record." Sumner v. Mata, 449 U.S. 539, 551, 101 S.Ct. 764,

771, 66 L.Ed.2d 722 (1981). In this case, the district court reviewed the state trial court transcript and concluded that nothing in the record supported the state trial court's determination that Maxwell's behavior caused him to forfeit his right of self-representation:[4]

> There are no specific instances of conduct alluded to in the record that might be considered outlandish. There is no indication in the record as to what actions the state court based its characterization of petitioner's behavior. Respondent neglects to refer to any specific instances of conduct in the record that would support the state court's characterization of petitioner's behavior. Additionally, there is simply no evidence in the record to support the conclusion that the pro se request was

4. Relying on Rhinehart v. Gunn, 661 F.2d 738 (9th Cir. 1981), and Davis v. Morris, 657 F.2d 1104 (9th Cir. 1981), the State argues that we should remand to give the state trial court an opportunity to state its reasons for denying Maxwell's motion for self-representation. It would be an empty exercise to remand in this case, as the state court's reasons for denying Maxwell's petition are clear on the face of the record.

> untimely or would have resulted in undue delay. Petitioner's pro se request was well taken and not conditioned upon the granting of a continuance. The record is contraposed to the state court's finding.

Maxwell v. Sumner, No. CV 78-820-RMT, slip op. at 6-7 (C.D.Cal. April 29, 1981).

The findings that Maxwell engaged in no outlandish behavior and that his motion was not made for the purpose of delay are based on "the fact-finding tribunal's experience with the mainsprings of human conduct," see Commissioner v. Duberstein, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198, 4 L.Ed.2d 1218 (1960), and on its experience in conducting trials and oberving defendants' behavior. We therefore review the district court's determinations as findings of fact, which, although based solely on documentary evidence, will be set aside only if clearly erroneous. Lundgren v. Freeman,

* * * *

307 F.2d 104, 113-15 (9th Cir. 1962).[5]

We hold that the district court's factual findings were not clearly erroneous. We agree with the district court that there is no basis in the record

5. Fed.R.Civ.P. 52(a) states in pertinent part:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

In some circuits, when a district court's findings of fact are derived from purely documentary evidence or from stipulated facts, the findings are not accorded the deference of a "clearly erroneous" standard of review, because no question of credibility is involved. See Merchants National Bank & Trust Co. v. United States, 246 F.2d 410 (7th Cir.), cert. denied, 355 U.S. 881, 78 S.Ct. 148, 2 L.Ed.2d 112 (1957); Orvis v. Higgins, 180 F.2d 537, 539 (2d Cir.), cert. denied, 340 U.S. 810, 71 S.Ct. 37, 95 L.Ed. 595 (1950).

The view of this circuit, however, which is based on the history and purposes of Rule 52(a), is to the contrary. See Lundgren v. Freeman, 307 F.2d at 114. Moreover, deference to the judgment of the district court is warranted in this case, because the trial judge, with his special expertise in conducting trials, is in a better position to judge whether a defendant's behavior was outrageous or his motion for self-representation was made with the intent to delay the trial.

for the state trial court's description of Maxwell's behavior as "outlandish." Additionally, because Maxwell's request to represent himself at trial was made prior to jury selection and the district court found that it was not made for the purpose of delay we hold that it was timely as a matter of law. Chapman v. United States, 553 F.2d 886 (5th Cir. 1977). See United States v. Price, 474 F.2d 1223, 1226-27 (9th Cir. 1973).

For the foregoing reasons, the judgment of the district judge is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY PAUL MAXWELL, Petitioner, v. G. W. SUMNER, Warden, San Quentin Prison, Respondent.	No. CV 78-820-RMT ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

This matter having come before this court for hearing on April 27, 1981, and this court, pursuant to 28 U.S.C. 636(b)(1), having conducted a de novo determination of those portions of the U.S. Magistrate's findings and recommendations which have been objected to, having considered the argument of counsel and the pleadings and other documents filed herein, and having filed its Memorandum.

IT IS ADJUDGED that the petitioner is entitled to a writ of habeas corpus from this court, having been convicted in violation of the Constitution of the United States.

IT IS ORDERED that a writ of

habeas corpus will issue unless the respondent and the State of California shall, within sixty days from the date the court's judgment becomes final, institute proceedings for a new trial.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Order and the Judgment, by United States mail, on petitioner, petitioner's counsel, the Attorney General of the State of California, and the Presiding Judge of the Superior Court of the State of California for the County of Los Angeles. corpus from this court, having been convicted in violation of the Constitution of the United States.

IT IS FURTHER ORDERED that the effective date of this Order will be stayed until April 30, 1981.

DATED: April 29, 1981.

ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY PAUL MAXWELL, Petitioner,	)	No. CV 78-820-RMT
v.	)	MEMORANDUM
G. W. SUMNER, Warden, San Quentin Prison, Respondent.	)	

This matter having come before this court on April 27, 1981, and this court, having considered the argument of counsel and the pleadings and other documents filed herein, this court hereby makes a de novo determination of those portions of the U. S. Magistrate's findings and recommendations as to which objections have been made:

PROCEDURAL BACKGROUND

On July 30, 1975, petitioner was sentenced to state prison in Los Angeles Superior Court. On September 16, 1976, petitioner's conviction was affirmed by the California Court of Appeals. On October 25, 1976, petitioner filed

petition for hearing before the California Supreme Court, which was subsequently denied.

On August 8, 1977, petitioner filed a petition for a writ of habeas corpus in the California Supreme Court, which was denied on October 6, 1977.

On March 3, 1978, petitioner filed his petition for writ of habeas corpus in this court. On May 14, 1979, the U. S. Magistrate filed his final report and recommendation recommending that a writ be conditionally granted. On May 15, 1979, this court entered its order for a conditional granting of a writ of habeas corpus.

Respondent appealed this court's May 15, 1979 order to the Ninth Circuit Court of Appeals which on July 10, 1980 reversed this court's May 15, 1979 order and remanded the action for this court's de novo determination of those portions of the Magistrate's findings to which objections have been made pursuant to 28 U.S.C. 636(b)(1).

The de novo determination concerning the Magistrate's findings and recommendation came before this court for hearing on April 27, 1981.

ISSUES

The only issues before this court at the April 27, 1981 hearing were whether petitioner's failure to raise the issue of self-representation on direct appeal to the California Supreme Court bars this court's review of the issue on federal habeas corpus, and whether petitioner had been denied the right of self-representation at trial.

STATE PROCEDURAL DEFAULT

Petitioner failed to raise the issue of self-representation on direct appeal to the California Supreme Court. Petitioner did raise the issue on a petition for a writ of habeas corpus to the California Supreme Court, which petition was denied. Petitioner's failure to appeal the issue directly to the California Supreme Court constituted a procedure violation that prevented further consideration of the issue in state courts. This type of state procedural default constitutes an adequate, independent state ground sufficient to bar federal habeas corpus review of the issue absent a showing of "cause" and "prejudice" attending the procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977).

Because "the denial of the right [to self-representation] automatically prejudices the defendant's freedom interest," Bittaker v. Enomoto, 587 F.2d 400, 403 (9th Cir. 1978), this court concludes that the requirement of "prejudice" under Wainwright has been met. See also Faretta v. California, 422 U.S. 806 (1975).

This court concludes that petitioner has also met the "cause" requirement set out in Wainwright. On February 11, 1976, the California Supreme Court decided People v. McDaniel, 16 Cal. 3d 156 (1976) which held that Faretta was not to be applied retroactively. Under McDaniel, the right to self-representation enunciated in Faretta was unavailable to petitioner since petitioner was tried prior to Faretta, and, therefore, subject to the earlier decision of People v. Sharp, 7 Cal. 3d 448 (1972) where the court held that there was no constitutional right to self-representation. On October 25, 1976 when petitioner filed a petition for hearing in the California Supreme Court, the issue of self-representation was not raised. The reason this issue was not raised was because

counsel on appeal decided that to raise the issue would be futile given the court's decision in McDaniel. This court concludes that, given the then recent decision of McDaniel, it is certain that it would have been futile for petitioner's appellate counsel to raise the issue of self-representation on direct appeal to the California Supreme Court.

The instant action is clearly distinguishable from the case of Estelle v. Williams, 425 U.S. 501 (1976). In Estelle, the court held that petitioner's failure to raise at the time of trial an objection to being garbed in a prison uniform due to a mistaken belief that it was the custom of the court not to allow civilian attire, did not constitute cause. In Estelle, there was no reasonable basis for petitioner's belief, and, in fact, it was later revealed that not only did such a custom not exist in that jurisdiction, but that the presiding trial judge had a custom of allowing civilian attire and would have sustained petitioner's objection had it been made.

This court concludes that despite petitioner's state procedural default, he has in fact met the requirements of

Wainwright, thus allowing this court to review the issue on federal habeas corpus.

SELF-REPRESENTATION

In light of Faretta, supra, and Bittaker, supra, this court concludes that petitioner, although tried prior to the issuance of the decision in Faretta, had a right to self-representation at trial. In Faretta, the court held that the Sixth Amendment affords every criminal defendant the right to self-representation. In Bittaker, the Ninth Circuit held that even prior to Faretta the right to self-representation had been the law of the Ninth Circuit.

The right to self-representation may be forfeited either if the defendant engaged in disruptive behavior or if the motion for self-representation is viewed as untimely and resulting in delay. U.S. v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Illinois v. Allen, 397 U.S. 337 (1970).

Petitioner's request to proceed pro se was made prior to the commencement of trial and prior to jury empanelment, and was not conditioned upon, or accompanied by, a motion for a continuance. Petitioner's request was timely. Chapman

v. U.S., 553 F.2d 886 (5th Cir. 1977).

Petitioner's actions during the time period proximate to his pro se request cannot be characterized as either disruptive or outlandish.

This court rejects the state trial court's conclusory statements that the petitioner's motion was made in "an attempt to delay the trial," and that petitioner's conduct was "outlandish."

In a federal habeas corpus proceeding contesting state custody, 28 U.S.C. § 2254 provides:

> ". . . a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,
>
> (8) . . . unless . . . the Federal court on a consideration of such part of the record as a whole concluded that such factual determination is not fairly supported by the record."

The court rejects the trial court's conclusory statements because it finds no basis for them in the record. There are no specific instances of conduct alluded to in the record that might be considered outlandish. There is no indication in the record as to what actions the state court based its characterization of petitioner's behavior. Respondent neglects to refer to any specific instances of conduct in the record that would support the state court's characterization of petitioner's behavior. Additionally, there is simply no evidence in the record to support the conclusion that the pro se request was untimely or would have resulted in undue delay. Petitioner's pro se request was well taken and not conditioned upon the granting of a continuance. The record is contraposed to the state court's finding.

This court finds that petitioner's right to self-representation as guaranteed by the Sixth Amendment of the Constitution of the United States was violated at the state trial. Therefore,

* * * *

petitioner is entitled to a writ of habeas corpus from this court.

Dated: April 29, 1981.

ROBERT M. TAKASUGI
United States District Judge

ORIGINAL

RECEIVED
SEP 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE W. SUMNER, Warden, San Quentin Prison, Petitioner, vs. ANTHONY PAUL MAXWELL, Respondent.	NO. 81-2249

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

JOSEPH SHEMARIA
Attorney at Law
8434 Wilshire Blvd., Suite 650
Beverly Hills, California 90211
(213) 658-7066

Attorney for Respondent

TOPICAL INDEX

	Page
QUESTIONS PRESENTED	1
JURISDICTION	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	2
ARGUMENT	
I UNDER THE FACTS OF THIS CASE A CALIFORNIA PRISONER HAS EXHAUSTED HIS STATE REMEDIES PRIOR TO INSTITUTING FEDERAL HABEAS CORPUS PROCEEDINGS.	6
II TITLE 28 U.S.C. SECTION 2254(D) CLEARLY AUTHORIZES A DISTRICT COURT TO MAKE FINDINGS CONTRARY TO A STATE COURT IN HABEAS CORPUS PROCEEDINGS.	12
III THE SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO SELF REPRESENTATION APPLIES RETROACTIVELY TO STATE CRIMINAL TRIALS OCCURRING PRIOR TO THIS COURT'S DECISION IN FARETTA V. CALIFORNIA, 422 U.S. 806 (1975).	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:	Page
Arnold v. United States, 414 F.2d 1056 (9th Cir. 1969)	16
Bayless v. United States, 381 F.2d 67 (9th Cir. 1976)	16
Bittaker v. Enomoto, 587 F.2d 400 (9th Cir. 1978)	15
Chapman v. United States, 553 F.2d 886 (5th Cir. 1977)	15
Engle v. Isaac, ___U.S.___, 71 L.Ed. 2d 783 (1982)	6,11
Faretta v. California, 422 U.S. 806 (1975)	7,15
In re Waltreus, 62 Cal. 2d 218 (1965)	8,10
Martin v. Wyrick, 658 F.2d 583(8th Cir. 1978)	15
Maxwell v. Sumner, 673 F.2d 1031 (9th Cir. 1982)	15
Menchaca v. Helms Bakeries, Inc., 68 Cal.2d 535 (1968)	9
People v. Holcolm, 395 Mich. 326 (1975)	16
People v. McDaniel, 16 Cal.3d 156 (1976)	7,6
People v. Sharp, 7 Cal. 3d 448 (1972)	16,17
Rose v. Lundy, ___U.S.___, 71 L.Ed. 2d 379 (1982)	6,11
Sumner v. Mata, 449 U.S. 539 (1981)	13,14
United States v. Frady, ___U.S.___, 71 L.Ed.2d 618 (1982)	6,12
Walker v. Loggins, 608 F.2d 731 (9th Cir. 1979)	15
Statutes	
28 U.S.C. §2254	13
Miscellaneous	
California Rules of Court, Rule 28(d)(2)	10
B.W. Witkin, California Procedure, Appeal	9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE W. SUMNER, Warden, San Quentin Prison, Petitioner, vs. ANTHONY PAUL MAXWELL, Respondent.	NO. 81-2249

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether under the facts of this case a California prisoner exhausted his state remedies prior to instituting federal habeas corpus proceedings?

2. Whether the federal court may make findings contrary to the state trial court where the findings are based only on a review of the state trial court transcripts?

3. Does the Sixth Amendment Constitutional right of self representation apply retroactively to state criminal trials occurring prior to this Court's decision in Faretta v. California, 422 U.S. 806 (1975)?

//

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1)

STATEMENT OF THE CASE

ANTHONY PAUL MAXWELL, petitioned the United States District Court for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Maxwell alleged that his constitutional right of self-representation was violated at his state criminal trial.

The District Court granted Maxwell the relief he sought and issued an order conditionally granting the petition for writ of habeas corpus. The Appellant, G.W. Sumner, Warden of San Quentin Prison, has obtained a stay pending appeal and appealed the order to the Ninth Circuit. The Ninth Circuit affirmed the judgment in Maxwell v. Sumner, 673 F. 2d 1031 (9th Cir. 1982).

STATEMENT OF THE FACTS

Prior to submitting the case for decision in the District Court, the parties entered into the following stipulation concerning the facts in this case.

On March 11, 1975, an information was filed in the Los Angeles Superior Court charging Anthony Paul Maxwell with two counts of robbery (Penal Code §211) and two counts of assault with a deadly weapon (Penal Code §245(b)). The information further alleged that at the time of the commission of the offenses, Maxwell used a firearm within the meaning of Penal Code, §12022.5.

On June 19, 1975, the trial in Maxwell's case commenced. On June 30, 1975, the jury found Maxwell guilty of all four criminal charges. Also, on June 30, 1975, the United States Supreme Court's decision in Faretta v. California, 422 U.S.

806 (1975) was filed with the Clerk of the United States Supreme Court.

In the reporter's transcript of Maxwell's trial, at pp. 48-57, the record indicates that Maxwell made a motion to relieve the deputy public defender assigned to represent him in his case. That motion was denied. Thereafter, Maxwell moved for permission to represent himself in pro se. That motion was likewise denied. This motion was apparently made on June 19, 1975. The record of Petitioner's request reads as follows:

> MAXWELL: Your Honor, Mrs. Cunningham told me that she didn't like my personality. She told me that she guaranteed me a conviction in this court and at this time I would like to enter a motion propria persona.
>
> THE COURT: That motion is denied.
>
> MAXWELL: I'd like to enter it anyway for the record.
>
> THE COURT: All right, you may.
>
> MAXWELL: I'd like to reflect that I am submitting that since the right to proceed pro se is bottomed on the Constitution, the defendant need not show actual prejudice in order to secure a reversal of a conviction. United States v. Pike, Ninth Circuit, 497 F. 2d 695, United States v. Price, 474 F. 2d 1223 (1973); and Bayless v. United States, supra, at 384 F. 2d 67.
>
> At this time I'd like to give the D.A. a copy of this and also a copy for the clerk to be incorporated into the clerk's transcript.
>
> THE COURT: The clerk will put it in the record. Hand it to the bailiff. I'm sure the district attorney doesn't want a copy.

//

Do you have any other motions?

The above colloquy between the Maxwell and the Court occurred on June 19, 1975. After his conviction, Maxwell filed a notice of appeal. On November 3, 1975, Maxwell's court-appointed counsel, Dennis L. Cava, filed an opening brief in the Court of Appeal of the State of California, Second Appellate District, arguing that Maxwell had been denied his constitutional right of self-representation under Faretta v. California, 422 U.S. 806 (1975). On September 16, 1976, in an unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five, Maxwell's judgment of conviction was affirmed. The Court of Appeal rejected Maxwell's argument that his rights under Faretta had been violated. The opinion of the Court of Appeal reads as follows:

> Citing Faretta v. California, 422 U.S. 806, defendant additionally contends that he was denied his constitutional right of self representation. The Faretta rule, however, is to be applied only to those cases commencing after June 30, 1975[2/] [Footnote 2: Defendant's trial commenced on June 19, 1975] the date upon which the decision in Faretta was filed. (People v. McDaniel, 16 Cal. 3d 156, 168). It is therefore inapplicable and the rule of People v. Sharp, 7 Cal. 3d 448, 459-461, must be applied in the present case.
>
> * * *
>
> Under these circumstances, we cannot say that there was an abuse of discretion in refusing defendant's belated request to act as his own counsel.

The record in the instant case filed with the District Court indicates that thereafter Maxwell filed a Petition for

//

Hearing in the California Supreme Court. The Petition was filed by his court-appointed lawyer, Dennis L. Cava. In that Petition, the Faretta argument was not raised, nor presented to the California Supreme Court. As required by Rule 28(d)(2) of the California Rules of Court, the Petition for Hearing in the California Supreme Court contained "a copy of the Opinion of the Court of Appeal." The Petition for Hearing in the California Supreme Court was denied. Thereafter, Maxwell filed a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California raising the Faretta issue.

The key dates in this case are briefly summarized as follows for the convenience of the Court:

June 19, 1975	Maxwell's motion to represent himself in pro se is denied.
June 30, 1975	Maxwell is convicted in Los Angeles Superior Court.
June 30, 1975	Faretta v. California, 422 U.S. 806 (1975) is decided.
July 30, 1975	Maxwell files a notice of appeal.
November 3, 1975	Maxwell raises his Faretta claim in the Court of Appeal of the State of California in his opening brief.
February 11, 1976	People v. McDaniel, 16 Cal. 3d 156 (1976) is decided by the California Supreme Court ruling that Faretta applies prospectively only to trials starting on or after June 30, 1975.
September 16, 1976	Maxwell's conviction is affirmed by the Court of Appeal and his Faretta claim is rejected pursuant to People

//

v. McDaniel, supra.

October 25, 1976 — Maxwell files a Petition for Hearing in the California Supreme Court and the Faretta claim is not raised.

October 6, 1977 — Maxwell's Petition for Writ of Habeas Corpus, filed directly in the California Supreme Court raising the Faretta claim, is denied.

February 21, 1978 — Maxwell files a Petition for Writ of Habeas Corpus in the United States District Court raising the Faretta claim.

ARGUMENT

I

UNDER THE FACTS OF THIS CASE A CALIFORNIA PRISONER HAS EXHAUSTED HIS STATE REMEDIES PRIOR TO INSTITUTING FEDERAL HABEAS CORPUS PROCEEDINGS.

The State's petition for writ of certiorari is now before this Court seeking to reverse the judgment granting a conditional writ of habeas corpus by a United States District Court. The State of California is arguing that this Court should apply recent decisions that have cut back on the habeas corpus remedy and reverse the Ninth Circuit Court of Appeals decision which affirmed the granting of the writ. These recent decisions are Rose v. Lundy _____ U.S. _____, 71 L. Ed. 2d 379 (1982); Engle v. Isaac, _____ U.S. _____, 71 L. Ed 2d 783 (1982); and United States v. Frady, _____ U.S. _____, 71 L. Ed. 2d 816 (1982). Unfortunately for the State of

//

//

California, none of these decisions apply to the unique facts of this case.

Both parties to this appeal agree that the facts of this case are not disputed as they relate to the waiver issue. Anthony Maxwell was charged in state court with the commission of two robberies and two assaults with a deadly weapon. Just prior to trial, he sought permission of the court to proceed in pro se. That motion was denied and his public defender remained as counsel over the objection of Mr. Maxwell. On June 30, 1975, a jury found Mr. Maxwell guilty of all four criminal charges. On the very same day, June 30, 1975, the United States Supreme Court decided Faretta v. California, 422 U.S. 806 (1975). Mr. Maxwell appealed his convictions to the Court of Appeal of the State of California. An attorney was appointed to represent him on that appeal. In the opening brief, it was argued that Mr. Maxwell was denied his constitutional right of self-representation under the Faretta decision. The Court of Appeal affirmed his conviction, citing the California Supreme Court decision of People v. McDaniel, 16 Cal. 3d 156 (1976).

In People v. McDaniel, 16 Cal. 3d 156 (1976), the California Supreme Court held that the Faretta decision applied only prospectively to trials starting on or after the date of the Faretta decision. Since Mr. Maxwell's trial started prior to the date of the Faretta decision, the Court refused to apply the holding in Faretta retroactively to the case of Mr. Maxwell.

Thereafter, a court-appointed attorney for Mr. Maxwell filed a petition for hearing in the California Supreme Court. In the legal brief attached to the petition, the attorney for Mr. Maxwell did not raise the self-representation issue. However, attached as an exhibit to the petition for hearing was a copy of the decision of the Court of Appeal in which the

self-representation issue was raised and rejected. The petition for hearing before the California Supreme Court was denied. Approximately one year after the California Supreme Court denied a hearing, Mr. Maxwell filed a petition for writ of habeas corpus directly in the California Supreme Court raising his self-representation issue. That petition was denied by the Court, citing In re Waltreus, 62 Cal. 2d 218, 225 (1965). The Waltreus case merely stands for the proposition that a "habeas corpus ordinarily cannot serve as a second appeal." (Id., at 225)

Maxwell contends that he has adequately raised the self-representation issue in the state court proceedings. He raised the issue in the trial court by making a motion for self-representation and he raised the issue before the California Court of Appeal by arguing that his rights under Faretta has been violated. Although the issue was not actually argued in the petition for hearing before the California Supreme Court, it was still the position of Mr. Maxwell that the legal issue was presented to the California Supreme Court when the petition for hearing was filed in his case. A petition for hearing in the California Supreme Court is an attempt to obtain discretionary review of the decision of the California Court of Appeal. It is similar to an attempt by a federal litigant to have the United States Supreme Court grant a discretionary writ of certiorari from an opinion of a lower federal Court of Appeals.

However, the California state court practice has one very important difference between it and the federal system. If the California Supreme Court grants a hearing in any particular case, the opinion of the Court of Appeal is vacated and thereafter the California Supreme Court will decide all the

//

legal arguments raised in the brief filed in the Court of Appeal. B.W. Witkin, California Procedure, Appeal, §617 p.4540 (1971). In California Procedure, the author states on p. 4540:

> An order granting a hearing must be signed by at least four justices and filed. (Rule 28(e)) On granting "the cause shall be placed on the calendar for oral argument, unless oral argument is waived." (Rule 28(f); see 17 So. Cal. L. Rev. 243) The case is then "at large," i.e., to be decided on the entire record and all the issues as if originally appealed to the Supreme Court, regardless of the ground relied upon in granting the hearing. And the opinion of the Court of Appeal ceases to have any effect, except perhaps to serve as a brief on the questions discussed, or a draft of an opinion to be adopted. (emphasis added)

An example of how this procedure works is seen from the decision of the California Supreme Court in Menchaca v. Helms Bakeries, Inc., 68 Cal. 2d 535, 541 n.1 (1968). In that case, the Supreme Court cited an issue raised in the Court of Appeal despite the fact that it was not briefed in the petition for hearing. In the Helms case, the Court states:

> Although plaintiffs did not raise the issue of negligent equipage in their petition for hearing, the question was briefed by both the parties and may be reviewed by this Court. An order granting a petition for hearing transfers the entire case here [citation] and the case is then to be decided on all issues, as if originally appealed to this Court, regardless of the grounds relied on in the petition. [citation]

Since Mr. Maxwell's petition for hearing contained a copy

//

of the opinion of the Court of Appeal, the Faretta issue was, technically speaking, raised in the petition for hearing. It is not disputed that every petition for hearing filed in the California Supreme Court must contain a copy of the entire decision rendered by the Court of Appeal. Rule 28(d)(2) of the California Rules of Court states that in a petition for hearing before the California Supreme Court, "each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of its filing." Obviously, in reviewing a petition for hearing, the Justices of the California Supreme Court do not confine themselves to the four corners of the petition itself. They must, of necessity, read the entire opinion of the Court of Appeal. In the present case, when that occurred, the self-representation issue was presented to all seven Justices of the California Supreme Court. It was at that point that Maxwell had exhausted all of his state court remedies.

And if that were not enough, Maxwell also filed a petition for writ of habeas corpus directly in the California Supreme Court raising the self-representation issue. That petition was denied, with the California Supreme Court citing the Waltreus decision. However, the Waltreus decision does not indicate that the self-representation issue was deemed to be procedurally barred by the California Supreme Court. Rather, a citation to the Waltreus decision indicates that the self-representation issue had previously been presented to the California Supreme Court and was rejected.

In the case of In re Waltreus, 62 Cal. 2d 218 (1965), a criminal defendant, who had already appealed his conviction and had his convictions affirmed on appeal, attempted to raise all of the same issues in a subsequent petition for writ of

//

habeas corpus in state court. The petition for writ of habeas corpus was denied on the grounds that "These arguments were rejected on appeal, and habeas corpus ordinarily cannot serve as a second appeal." In re Waltreus, supra, at 225. Thus, in denying Mr. Maxwell's petition for writ of habeas corpus, the California Supreme Court, by citing to the Waltreus decision, was in effect stating to Maxwell that it had already passed upon the self-representation issue in the earlier petition for hearing filed after his unsuccessful appeal in the Court of Appeal of the State of California. Therefore, there has been no waiver of the self-representation issue and that it has been raised at all levels of the state criminal proceedings: the trial level, the Court of Appeal, and the California Supreme Court.

None of the recent cases limiting habeas corpus even remotely applies to Mr. Maxwell's case. Rose v. Lundy _____ U.S. _____, 71 L. Ed. 2d 783 (1982) held that a petition for writ of habeas corpus must be dismissed when it contains both exhausted and unexhausted claims. Engle v. Isaac, _____ U.S. _____, 71 L. Ed. 2d 783 (1982) held that habeas corpus relief is barred where a prisoner failed to make a contemporaneous objection at trial to the giving of a jury instruction which later case law held to be violative of due process. Under Engle, a prisoner has not shown good "cause" for failing to raise the issue in the state courts merely because existing state court decisions had rejected the constitutional claim in the past.

Finally, in United States v. Frady, _____ U.S. _____, 71 L. Ed. 2d 816 (1982) this Court held that "cause and actual prejudice" rather than "plain error" is the proper standard of

//

//

review on a motion for collateral relief under 28 U.S.C. §2255. The prejudice element of the cause and prejudice test required a showing that the constitutional violation prejudiced the defendant by interfering with his right to a fair trial.

In Mr. Maxwell's case, the cause and prejudice test was never reached as there was no bypass of the state courts and Mr. Maxwell did exhaust his state remedies prior to seeking habeas corpus relief.

II

TITLE 28 U.S.C. SECTION 2254(D) CLEARLY AUTHORIZES A DISTRICT COURT TO MAKE FINDINGS CONTRARY TO A STATE COURT IN HABEAS CORPUS PROCEEDINGS.

The State of California posed the second question in this case as follows: "May a federal court, consistent with principles of comity, disregard a state court's factual determinations, reweigh the evidence presented to the state court and make contrary findings, where the federal court's findings are based solely on a review of state court transcripts?" That question has already been answered by this Court in Sumner v. Mata, 449 U.S. 539 (1981).

In Sumner this Court held that the District Court in habeas corpus proceedings has the authority under 28 U.S.C. §2254(d) to reweigh the evidence relied upon by a state court in determining a factual issue and to conclude that the factual determination is not fairly supported by the record. All that is required to implement this power is for the District Court to apply on the face of the opinion the initial presumption of correctness mandated by 28 U.S.C. §2254(d) to

//

the state factual determination. So the question posed by the State of California has already been answered in the affirmative by this Court in Sumner v. Mata, supra.

The added factor raised by the State in their phrasing of the issue is whether the District Court's mere reading of the state trial transcripts constitutes an adequate hearing at which the Court's power, under 28 U.S.C. §2254(d) may be exercised. However, this issue has never before been raised by the State of California in any of the prior proceedings in this case. In the Court of Appeals, the State argued that after reading the state trial transcripts, the District Court simply reached the wrong conclusions.

Ironically, it was the State which provided the transcripts of Mr. Maxwell's state criminal trial as an exhibit in support of Mr. Maxwell's confinement in prison. No objections were ever made by either party in the District Court to the Court's reading of the record of the criminal trial. How else could the District Court familiarize himself with the alleged constitutional violation? The transcripts of the criminal trial were a verbatim record of what had occurred and probably formed the best evidence upon which the District Court could rely. Thus the petition for certiorari should be denied.

In a collateral issue the State argues that the Ninth Circuit erroneously stated the standard of review in habeas corpus appeals. In this case, the Appellate Court stated that the decision of the District Court would not be reversed unless the findings of the District Court were clearly erroneous. Maxwell v. Sumner, 673 F. 2d 1031, 1036 (9th Cir. 1982). This is the appropriate standard of review under Rule 52(a) of the Federal Rules of Civil Procedure, which provides in part that "Findings of fact shall not be set aside unless clearly

//

erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness".

The State argues that since the record consisted of merely the transcripts of Mr. Maxwell's state trial, that there were no witnesses whose credibility had to be resolved by the District Court. Therefore, the argument proceeds, the Court of Appeal should review the record of the state trial and make its own independent determination of whether Mr. Maxwell engaged in improper conduct which would permit the state trial judge to deny his self-representation motion.

Such an argument would be inconsistent with a correct understanding of the functions of a trial court as opposed to the functions of an appellate court. The trial court must make the initial factual determination subject to review on appeal for error of law by the appellate court. The State's argument would turn the Ninth Circuit Court of Appeals into a second trial court giving the state a second opportunity to have a federal court weigh the evidence and make factual findings and determinations. Such an argument should not be accepted.

III

THE SIXTH AMENDMENT CONSTITUTIONAL RIGHT OF SELF REPRESENTATION APPLIES RETROACTIVELY TO STATE CRIMINAL TRIALS OCCURRING PRIOR TO THIS COURT'S DECISION IN FARETTA V. CALIFORNIA, 422 U.S. 806(1975).

The Respondent, Anthony Paul Maxwell, must candidly concede that there is a split of authority in the federal circuits on the issue of the retroactivity of Faretta v. California, 422 U.S. 806 (1975). This Court's Faretta

//

decision held that a criminal defendant is entitled under the Sixth Amendment to the right of self representation in his criminal trial. In Faretta this Court stated:

> To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the state, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the life-blood of the law." (422 U.S., at 834)

On the one hand, the Eighth Circuit has held that the Faretta decision is not retroactive to cases tried before the date of that decision. Martin v. Wyrick, 568 F. 2d 583 (8th Cir. 1978). On the other side is the Fifth Circuit and the Ninth Circuit which give the Faretta decision complete retroactivity. Chapman v. United States, 553 F. 2d 886 (5th Cir. 1977); Bittaker v. Enomoto, 587 F. 2d 400 (9th Cir. 1978); Walker v. Loggins, 608 F. 2d 731 (9th Cir. 1979); Maxwell v. Sumner, 673 F. 2d 1031 (9th Cir. 1982)

The state courts appear to likewise be in disagreement over the retroactivity issue. See, People v. McDaniel, 16 Cal. 3d 156 (1976) cert. denied 429 U.S. 847 (1976) (holding

//

Faretta not retroactive) and People v. Holcomb, 395 Mich. 326 (1975) (holding Faretta is retroactive). The problem is particularly acute in California where the California Supreme Court is against retroactive application of Faretta and where also the United States Court of Appeals for the Ninth Circuit is consistently releasing state prisoners whose self representation motions were made and denied prior to this Court's Faretta decision. Before Faretta, California refused to recognize any constitutional right to self representation. People v. Sharp, 7 Cal. 3d 448 (1972).

Nevertheless, the Respondent urges this Court to deny the petition for writ of certiorari because the approach of the Ninth Circuit in this case is patently correct. In arguing that the Faretta case should not be applied retroactively, the State of California assumes that the Faretta case established a new principle of constitutional law. Although it is true that the rule was new as it applied to state court criminal proceedings in the State of California, it was not a new principle in criminal proceedings in the federal courts of the Ninth Circuit. See, Arnold v. United States, 414 F. 2d 1056, 1058 (9th Cir. 1969); Bayless v. United States, 381 F. 2d 67, 71 (9th Cir. 1976).

The principles governing whether or not a case should be applied retroactively are set forth in Stovall v. Denno, 388 U.S. 293 (1967). The three factors that the Court should consider are "(a) purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of the retroactive application of the new standard." Stovall v. Denno, supra at 296-297.

All of the three standards weigh in favor of making the

//

Faretta decision retroactive. The purpose of the new standard is no less than to honor the personal liberty and dignity of the individual. Although California may have placed great reliance upon their own decision in People v. Sharp, supra, that reliance could not have been very firm in light of all the Ninth Circuit decisions indicating that the accused has a constitutional right of self-representation. Finally, the effect on the administration of justice is not so great as to indicate that Faretta must be limited to prospective application. In Stovall v. Denno, supra, the Court was faced with the issue of whether or not the newly enunciated constitutional right to have an attorney present at a lineup should be applied retroactively. The Court found that "The law enforcement officials of the Federal Government and all of the 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification. Today's rulings were not foreshadowed in our cases; no court announced such a requirement until Wade was decided by the Court of Appeals for the Fifth Circuit, 358 F. 2d 557.... It is, therefore, very clear that retro-application of Wade and Gilbert would seriously disrupt the administration of our criminal laws." Stovall v. Denno, 388 U.S. 293, 299-300 (1967) Thus, the Supreme Court held that the Wade and Gilbert rules should not be made retroactive.

On the other hand, there is no indication that the Federal Government and all of the 50 States have assumed that there was no constitutional right of self-representation. On the contrary, the Ninth Circuit has expressly recognized such a right on numerous occasions in the past. Furthermore, the issue of self-representation is an issue that arises only infrequently during the course of state criminal proceedings.

Thus, the danger of having Faretta apply retroactively to literally thousands of cases is simply not what has occurred. Rather, a few isolated situations have arisen where defendants have successfully petitioned for habeas corpus on the grounds that their constitutional right of self-representation was violated prior to Faretta. In light of these facts, allowing Faretta to be retroactive would not seriously disrupt the administration of the criminal laws.

CONCLUSION

Based upon the foregoing, the Respondent urges the Court to deny the petition for writ of certiorari.

Respectfully submitted.

JOSEPH SHEMARIA
Attorney for Respondent
ANTHONY PAUL MAXWELL

PROOF OF SERVICE BY MAIL

I affirm that I am a United States citizen, over 18 years of age, and not a party to the within action. I am employed in Los Angeles County, California, at the Law Offices of Joseph Shemaria, 8484 Wilshire Boulevard, Suite 650, Beverly Hills, California 90211, by Joseph Shemaria, a member of the Bar of this Court, at whose direction the service of mail described herein was made.

On September 9, 1982 I served the within BRIEF OF RESPONDENT IN OPPOSITION on the Attorneys for Petitioner in said action by depositing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States, at Beverly Hills, California, addressed as follows:

ATTORNEY GENERAL
State of California
3580 Wilshire Boulevard
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of September, 1982, at Beverly Hills, California.

Nancy Johnson
Nancy Johnson

SEP 27 PAGE 19

RECEIVED
SEP 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE W. SUMNER, Warden San Quentin Prison, Petitioner, vs. ANTHONY PAUL MAXWELL, Respondent.	NO. 81-2249

MOTION TO PROCEED IN FORMA PAUPERIS

AND FOR APPOINTMENT OF COUNSEL;

DECLARATION OF JOSEPH SHEMARIA

JOSEPH SHEMARIA
Attorney at Law
8484 Wilshire Boulevard
Suite 650
Beverly Hills, California 90211
(213) 658-7066

Attorney for Respondent
ANTHONY PAUL MAXWELL

RECEIVED
SEP 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSEPH SHEMARIA
Attorney at Law
8484 Wilshire Boulevard, Suite 650
Beverly Hills, California 90211
(213) 658-7066

Attorney for Respondent
ANTHONY PAUL MAXWELL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GEORGE W. SUMNER, Warden San Quentin Prison, Petitioner, vs. ANTHONY PAUL MAXWELL, Respondent.	NO. 81-2249 MOTION TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL; DECLARATION OF JOSEPH SHEMARIA

Respondent ANTHONY PAUL MAXWELL asks leave to file an opposition to a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner further requests that Joseph Shemaria, Attorney at Law, be appointed as counsel for Petitioner in this Court. An affidavit in support of this motion is attached hereto.

DATED: September 2, 1982

JOSEPH SHEMARIA
Attorney for Respondent
ANTHONY PAUL MAXWELL

RECEIVED
SEP 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DECLARATION OF JOSEPH SHEMARIA

I, JOSEPH SHEMARIA, declare the following to be true and correct under penalty of perjury:

1. That I am an attorney licensed to practice in the State of California and admitted to the Bar of the United States Supreme Court;

2. That I was appointed to represent Respondent, Anthony Paul Maxwell, by both the United States District Court (Central District of California) and the United States Court of Appeals for the Ninth Circuit;

3. The Respondent, Anthony Paul Maxwell, because of his poverty, is unable to pay the costs or attorney fees for representation before this Court and is unable to give security for the same;

4. That I have represented Respondent all the way through his proceedings in District Court, on appeal from the first judgment granting the writ of habeas corpus (in the U.S. Court of Appeal for the Ninth Circuit); after reversal by the Ninth Circuit, I continued representing him in further proceedings in District Court culminating in a second judgment granting a (conditional) writ of habeas corpus and was appointed by the Ninth Circuit to represent him on the second appeal by the State of California;

5. That I am intimately familiar with the factual, legal and procedural history of this case and Respondent has indicated to me his strong desire that I represent him before this Honorable Court if certiorari is granted;

6. If the State of California's Petition for Writ of Certiorari is granted, it is respectfully requested that the Court appoint Joseph Shemaria, Attorney at Law, 8484 Wilshire

//

Boulevard, Suite 650, Beverly Hills, California 90211, (213) 658-7066, to represent the Respondent.

Executed this 2d day of September, 1982, at Beverly Hills, California.

Joseph Shemaria

JOSEPH SHEMARIA

PROOF OF SERVICE BY MAIL

I affirm that I am a United States citizen, over 18 years of age, and not a party to the within action. I am employed in Los Angeles County, California, at the Law Offices of Joseph Shemaria, 8484 Wilshire Boulevard, Suite 650, Beverly Hills, California 90211, by Joseph Shemaria, a member of the Bar of this Court, at whose direction the service of mail described herein was made.

On September 9, 1982 I served the within MOTION TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT COUNSEL; DECLARATION OF JOSEPH SHEMARIA on the Attorneys for Petitioner in said action by depositing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States, at Beverly Hills, California, addressed as follows:

ATTORNEY GENERAL
State of California
3580 Wilshire Boulevard
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of September, 1982, at Beverly Hills, California.

Nancy Johnson